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# Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law

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The MIT Press  
Cambridge, Massachusetts  
London, England

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This book was set in Sabon by Binghamton Valley Composition. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Baber, Walter F., 1953–

Global democracy and sustainable jurisprudence : deliberative environmental law / Walter F. Baber and Robert V. Bartlett.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-262-01302-4 (hardcover : alk. paper)—ISBN 978-0-262-51291-6 (pbk. : alk. paper) 1. Environmental law, International. 2. Environmental policy.

I. Bartlett, Robert V. II. Title.

K3585.B33 2009

344.04'6—dc22

2008044233

10 9 8 7 6 5 4 3 2 1

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## Toward an International Environmental Jurisprudence: Problems and Prospects

It has become commonplace in the environmental community to hear people wonder whether now, at the dawn of the twenty-first century, humankind will finally develop the intelligence necessary to ensure our survival as a species (Caldwell 1998, 5). As compelling a question as this often seems, it misses the most essential point in a variety of ways. First, the twenty-first century, like the centuries that preceded it, is an entirely human construct of no ecological significance. Now is no more opportune a moment than any other for the development of a new relationship between humans and their environment. Second, the survival of humankind as a species is no more important ecologically than the turning of a calendar page. Third, it is far from clear that the essential challenge to human survival is a shortage of intelligence. From the perspective of evolutionary biology, it may be that humankind is already too smart for its own good. Indeed, the noted biologist Ernst Mayr has argued that, judging by the empirical record regarding species success, it is clearly better to be stupid than to be smart (Chomsky 2005, 1). Our ability to use what we know should be more central to our concerns.

So how might the environmentalist's question be appropriately rephrased? Assuming that our focus will continue to be human survival, regardless of nature's indifference to that issue, we might pose the following question. What changes in our collective behavior are required if the biological preconditions of our continued existence are to be satisfied and how are those changes to be brought about? This formulation of the problem has several distinct advantages.

First, an emphasis on behavior allows us to focus our attention on human agency. Our actions, for better or worse, are willed events. They are subject to our control to an extent that other environmental variables of-

ten are not. Placing our own actions at the center of our environmentalism puts humankind's fate in our own hands (to the greatest degree that is possible). In addition, a focus on willed action has the salutary effect of preempting excuses for environmentally unsustainable behavior as the unavoidable consequence of impersonal systems such as nations and markets (Hiskes 1998). In other words, it allows us to hold one another responsible for environmental protection.

Second, attending to the biological preconditions of human survival, as broad a topic as that is, will lend our environmentalism a measure of focus and a sense of urgency that other approaches often lack. Perfectly valid concerns for issues like animal rights and ecological amenities such as pristine wilderness have shown only a limited capacity to seize the imagination of the general populace, even in the wealthiest and most literate countries where appeals on their behalf might have been expected to resonate. If protection of the environment in the developing world is any part of our agenda, our emphasis must move even more strongly to those matters that impinge directly on the health and welfare of humankind as a whole (Porter, Brown, and Chasek 2000, esp. chap. 5).

Finally, concentrating on the methods by which the environmentally necessary changes in human behavior can be brought about will help to prevent what is necessarily a conceptual enterprise from becoming entirely detached from reality. Our concern for a theoretically sound understanding of the ethical issues we confront and the ecological challenges that we face cannot so preoccupy us that we neglect the question of the institutions and resources that are necessary to implement any decisions we are able to formulate. Effective knowledge of what our survival requires and the will to use that knowledge must still be supported by political power in some form (O. Young 1994).

Our task, then, is immodest in the extreme. It is to outline an approach to collective will formation, the development of applied policy expertise, and the creation of institutions and the marshalling of political resources that can be appropriate to the protection of the environment on a global scale. This approach must constitute an international environmental jurisprudence, not only an explanation of what the law of the global environment should be, but also a theoretical construct to aid in its interpretation and implementation.

## **Will Formation—Policy Prerequisites**

It is necessary to address a threshold question, the answer to which will guide our subsequent analysis. Is it even possible to construct an environmental jurisprudence at the global level? No one doubts that treaties can be negotiated between nations to advance the cause of environmental protection. But is it really possible that an international environmental consensus, amounting to a collective determination to follow a shared course for reasons held in common, can emerge from our disjointed and competitive system of global governance?

One view of international law, perhaps the dominant view, is that it can never really be law in the proper sense. The “law obtaining between nations is not positive law” because “every positive law . . . is set by a sovereign person, or sovereign body of persons” (Austin [1832] 2000, 201, 193). Any effort to conceptualize an international polity must, therefore, recognize that “the universal society formed by mankind, is the aggregate good of the particular societies into which mankind is divided; just as the happiness of any of those societies is the aggregate happiness of its single or individual members” (294). This perspective on international law provides a foundation for the “realist” analysis of international affairs generally, which emphasizes that the only significant actors on the world stage are nations, which pursue their own interests always and in all things (Morgenthau 1978).

The fundamental insights captured by the realist viewpoint are appealing because they explain a great deal of what we think we know about international politics generally and international environmental affairs in particular. It makes sense of the fact that, whereas it is often considered a moral duty to be informed about world events, one is not normally expected to do much about them (Belshaw 2001). Moreover, the inherent limits of democratic discourse seem to argue against its use at the international level. A shared sense of community obligation, absent beyond the boundaries of the state, is often thought to be necessary to overcome the presumption that mere political argument by one actor cannot change the preferences of another actor (Austin-Smith 1992). The resulting conclusion, that all speech acts in international politics are merely strategic, leads one to doubt that any shared will at the global level is possible. It may also explain why “democracy has achieved real gains within states, but very meager ones in the wider sphere, both in terms of relations between states and on global issues” (Archibugi 2003, 5).

With respect to global environmental affairs in particular, there are additional reasons to doubt the possibility of international consensus. First, early nation-states lived within boundaries that usually conformed to some set of natural criteria. This allowed for a genuine, if sometimes fluid and indistinct, sense of a home region that provided the basis for an ecological knowledge and community solidarity that was facilitative of collective action (Snyder 1998). The expanded boundaries of modern nation-states, and emerging regional communities like the European Union, undermine the existence of that shared sense of place. In its absence, the citizens of existing nations find it hard to build a domestic consensus on the environment, let alone participate in an international environmental concord. This difficulty is reflected in the problems confronted by the European Union in implementing its developing environmental policies (Demmke 2004). The trend toward globalization has, in many ways, made matters worse. National governments have been forced into “a zero-sum game where necessary economic objectives can be reached only at the expense of social and political objectives” (Habermas 2001b, 51). Among the most troublesome manifestations of this global game, also evident within nation-states lacking strong central authority, are the tendency to discount excessively future environmental damage (Cumberland 1979) and the temptation to export environmental problems resulting from patterns of economic trade (Gormley 1987).

Taking all of these matters into account, why would anyone be optimistic about the prospects for a global consensus on environmental protection? One reason might be that optimism at the global level is the only realistic alternative to a universal and thoroughly depressing pessimism. Yet beyond this general preference for hope over despair, environmental problems provide an obvious example of issues that rightly belong to the global community because the level of “interconnectedness and interdependence” involved makes those problems impossible for national or regional authorities to resolve alone (Held 1995, 235). As far back as John Stuart Mill there has existed a concept of joint ownership of natural resources from which specific rights can legitimately be inferred (Nathan 2002). There is a growing realization that states are interdependent, sharing common interests that lead them to cooperate, and that cooperation is self-reinforcing because cooperative institutions come to be valued in themselves over time (Keohane and Nye 1977; Miles et al. 2002).

So, in an age of globalization, political, moral, and cultural boundaries are all unstable. Both genetic and human diversity are at risk (Curtin 1999).

Humankind is irreducibly heterogeneous and is destined to remain so. But collective identities from the local to the global are made, not found. They have the potential to unify the heterogeneous in a common political life in which all participate on equal terms while they remain “others to one another” (Habermas 2001b, 19). In the final analysis, the fundamental issue is “whether we can foster democratic, or at least relatively noncoercive, discourse about global change” (Curtin 1999, 17). The development of such a discourse is essential if we are to develop the extended political alliances that will allow democracy to “catch up with the forces of a globalized economy” (Habermas 2001b, 53).

Clearly, globalization and the environmental challenges it presents suggest the need for a form of ecological thinking that transcends narrowly nationalistic frames of reference (Lahsen 2004). Optimism about this project is justified by the fact that nations do not have intrinsic and unalterable characters but are, rather, imagined communities that rely on a variety of symbolic elements, historical narratives, customs, and institutional structures to create and reinforce a sense of shared identity (Anderson 1983). Environmental sustainability is largely a concept of community, or common purpose (Bryner 2004). To build a consensus in support of sustainability is a necessarily democratic and participatory exercise for at least two reasons. First, developing a consensus for sustainability requires a breaking down of the polarized and polarizing languages that reflect entrenched political ideologies. This kind of consensus building is essential for the development of community-based solutions to issues of sustainability that can survive outside the carefully constructed confines of environmental interest groups (Plevin 1997) and can penetrate the well-defended bastions of business and government. So, for entirely practical reasons at least, any global environmental initiative must be democratic and broadly participatory.

Second, environmental values and democracy are bound together at the level of principle (Eckersley 1996). To understand why this is so, we must only recognize that politics is increasingly organized around risk allocation. The targets of risk are so numerous, and so capable of political mobilization, that they undermine the legitimacy of the socioeconomic power structure. The resulting crisis of legitimacy can only be addressed by public participation in the allocation and amelioration of risk (U. Beck 1992). In this way, the challenge of global sustainability demonstrates that the crises of ecology and democratic legitimacy are inextricably linked. A discursive form of democracy is better placed than alternate

political models to foster a fruitful engagement between humans and their environment (Dryzek 2000) because only it can give voice to the otherwise silent revolution of postmaterialist values that environmentalism represents (Ingehart 1977). Thus, arbitrary or authoritarian approaches to protection of the environment have to be dismissed as unacceptable in principle, even if they were not destined to fail (which, of course, they are).

### **From Willing to Knowing: Is Smarter Better after All?**

Having argued that a global consensus in support of environmental sustainability is possible (provided that it is democratic), the next logical step is to suggest what content that consensus will have to encompass. Some of the challenges that we face are clear. Whereas the character of global environmental problems suggests the need for a form of ecological thinking that transcends narrowly nationalistic frames of reference, universalizing discourses must be approached with caution. They can distract us from the need to confront concrete and local inequities and can mask the interests of those who (often claiming to support “sustainability”) advocate measures that generate those inequities. The emergence of a global epistemic community is undoubtedly essential for environmental protection. But experience suggests that it will be a complex domain characterized by both transnational networks tending toward cognitive convergence as well as persistent lines of division that will render any global environmental consensus precarious and unstable (Lahsen 2004).

It has long been recognized as something of a paradox that environmentalism both blames modern science for environmental degradation and looks to it for support and solutions (Yearly 1992). In fact, an environmental crisis cannot even be perceived as such without a great deal of scientific information and technological sophistication (Caldwell 1990). Given the limits of the sciences, the dependence of environmentalism on them means that there will always be a degree of uncertainty about the true nature and severity of environmental problems (Kirkman 2002). This uncertainty will be exacerbated by certain tensions that are inherent in the interrelationship of science, environmentalism, and democracy.

A fundamental element of modernity is its empiricism. At its most basic, this article of the modern faith is captured by John Locke’s assertion in *An Essay Concerning Human Understanding* that “all the materials of reason and knowledge” derive from experience (Locke [1689] 1952,



121–122). Yet the amount of knowledge that we can justify from evidence directly available to us can never be very large. The overwhelming proportion of our factual beliefs will, necessarily, be held at secondhand through trusting others (Polanyi 1958), others whom we often refer to as experts. It is hardly irrational to recognize an expert's authority by taking his or her reasoning as a proxy for our own when we have grounds to suppose that he or she knows more than we do and that, if we had access to that knowledge, we would draw the same conclusions (R. Friedman 1973). The advantages of a respect for the authority of science-based expertise are numerous. We stand to gain the accuracy of judgment and depth of ecological understanding that is provided by the specialized training and quality-control mechanisms of modern scientific disciplines (MacRae and Wittington 1997). Moreover, the habits of thought encompassed and encouraged by modern environmental science carry benefits not specific to the environmental arena. The development of an ecological consciousness, grounded in the environmental sciences, can promote more enlightened and progressive policy choices generally by highlighting the actual and potential relationships between the interdependencies in nature and those in the social realm (Valadez 2001). There are many, however, who argue that science is at best a mixed blessing.

All of science is, at least in part, a matter of observation. What we choose to observe in any situation is a function of our background theories and assumptions. It can hardly be otherwise (N. Hanson 1958). Our ability to deal with knowledge is hugely exceeded by the potential knowledge contained in our environment. To cope with this diversity, our perception, memory, and thought processes long ago came to be governed by strategies for protecting our limited capacities from the confusion of overloading (Bruner 1962). Even science, therefore, is irreducibly personal. When it takes the form of expert judgment, it constitutes a form of tacit knowledge that people know for reasons beyond those that they can clearly enunciate (Stone 2002). The situation is further complicated by the fact that most policy problems, including those related to the environment, transcend the domain of any one discipline (MacRae and Wittington 1997). They arise within the context of a civil society in which everyone, no matter how accomplished, is a layman in the face of the expertise possessed by others (Habermas 2001c).

For all of these reasons, the supposed objectivity of science and its claims to expertise may not take us very far. What we think of as facts, assertions intended as true representations about the state of the world,

are produced by complex social processes. They come not from direct observation, but from social knowledge that is an accumulation and presentation of observations and beliefs that are structured by both our shared as well as our personal experiences (Stone 2002). This opens science-based environmental expertise to a variety of criticisms. As an example, it is alleged that science is closed to the oppressed and disadvantaged (Jennings and Jennings 1993). This is a criticism that, to the extent it is true, is even more troubling at the international level than it is within nation-states. Others suggest that normative commitments, like the balance of nature (nature in balance) vision, have distorted model building in environmental science (Shrader-Frechette and McCoy 1994). Still others complain that scientific detachment from the realm of human values and ethical principles allows even those whose careers involve the study of nature to participate in its devaluation (Gismondi and Richardson 1994). No wonder that many people, citizens and scientists alike, resist even the most apparently objective and factual knowledge because of its source, its implications, or the challenge it presents to their own tacit knowledge (Stone 2002).

Beyond these general limitations to the reach of science, the search for knowledge about the relationship between humans and their environment confronts a special challenge. Since at least the time of Kant, it has been recognized by cognitive scientists that understanding even so basic a cognitive function as perception requires us to focus on the environment rather than on what goes on within the human organism (Ben-Zeev 1984). Social theorists, in their more lyrical mode, agree that “the very ground and horizon of all our knowing” is the earth itself (Abram 1996, 217). The environment cannot be understood merely as surroundings, no matter how static one’s analytical perspective. It is, rather, a dynamic relationship (Caldwell 1971, 5). Neither environments nor organisms are independent entities, captured by a biology that views one as a source of demands for adaptation and the other as a survival calculus at work (Lewontin 1992). In the case of humans, the relationship between the knower and the known is more complex still.

Physical environments play a constitutive role in the most basic activities of the mind. Vision, for example, is an activity rather than a passive response to stimulus. What humans see is a function of what they look at, what they look for, and what they notice (Gibson 1979). There is a connection between cognition and the landscape within which, from our earliest experiences, we are able to think about ourselves and structure

our relationships with others (Cobb 1977). So the physical environment is not simply a site in which knowing occurs. It is, rather, a highly specific and normatively significant place that continually presents alternative possibilities for active knowing (Casey 1997). Thus the ecological forms of thought we are called upon to develop are patterns of understanding in which human cognition interacts with an environment rich in the information resources that are vital for organizing our individual and collective existence (Hutchins 1995).

This relationship between knowledge and place might be regarded, for good or ill, as a limitation on the reach of science. But need it be? A general suspicion of science, coupled with the inherent uncertainty of its results, can make the gulf separating scientists and grassroots environmentalists difficult to bridge (Foreman 2002). Moreover, information regarding long-term environmental hazards and necessary hazard adjustments are comprehended by residents of an area at risk only to the degree that they are communicated in language that is familiar to them (Lindell and Perry 2004). Is it too much to expect that scientists will adapt their messages to suit their audiences and that citizens be asked to meet them halfway? In a democratic and multicultural environment, scientists must recognize this necessity (Habermas 2001b). It makes little sense for indigenous populations to claim that coming to terms with what science can tell us is damaging to their cultural institutions. After all, a society becomes ecologically irrational when its forms of epistemic authority and institutional practices threaten the ecosystemic relations on which it relies (R. Bartlett 1986, 2005; Dryzek 1987). When a society fails to preserve the life-support systems on which its members depend, the preconditions of the society's continued existence (and that of its cultural and social institutions) are compromised (Dryzek 1983).

In light of these considerations, the local specificity of knowledge can be regarded as positive rather than limiting, especially given the enormously heterogeneous character of both the natural environment and human society. Important categories of "localness" may include culturally distinctive interests, ways of organizing knowledge production, and discursive traditions (Harding 1998). Yet the essential character of scientific understanding is not surrendered simply by recognizing that knowledge is not a transcendental phenomenon, but, rather, a local commodity designed to satisfy local needs and solve local problems (Feyerabend 1987). Environmental science and politics should be seen as coproduced, or as mutually reinforcing at every step. Politics are not merely stimulated by scientific

findings but are prevalent in the shaping and dissemination of environmental science (Forsyth 2003).

Just as the production of a critical political ecology requires adaptation in the scientific community, science has significant transformative potential for politics. There is little doubt that the move to exclude meta-physical perspectives and forms of discourse from discussions of ethics and politics in this century has been inspired by the success of the natural sciences (Williams 1999). The consequences of this have been positive for both democracy and environmental protection (Baber and Bartlett 2005). Realizing that science and politics are coproduced carries with it the power to reveal the covert uses of science for political objectives. It also allows for the devolution of environmental scientific governance within diverse social groupings in pursuit of democratically determined solutions at the local level (Forsyth 2003). This can promote the more effective use of scientific knowledge by creating “ecologies of knowledge”—dense, cross-hatched relationships of practice and process that retain environmental knowledge through use rather than allowing it to dissipate through suspicion or indifference (Brown and Duguid 2002).

Having suggested that there is a particular form of ecological science that is appropriate as a foundation for an international consensus in support of environmental protection, it remains to suggest what institutional forms that consensus might take and by what means they might be developed. One of our initial premises is that any global environmental consensus will have to be democratic. But what, precisely, does democratic mean in this context? Indeed, what can it mean?

### **From Thinking Locally to Acting Globally**

As a general matter, it is widely believed that international politics suffers from a “democracy deficit” (Wallace 2001). This deficit is a consequence of the fact that the decisions made within international institutions are driven by democratic concerns only to the extent that domestic foreign policy in the various nations is the result of democratic politics. International democracy, so it might be argued, will never be more than a theoretical possibility in the absence of a sovereign and democratically elected legislature at the global level (Slaughter 2004). Recent explorations of the idea of deliberative democracy, however, hold out a different hope. Deliberative democracy is particularly well suited to the task of environmental protection (Baber and Bartlett 2005; Meadowcraft 2004). Deliberative

democracy, operating at the boundary between the state and civil society, is a political practice that can generate broader public support for more ecologically sound policies while enhancing the institutional capacities of public agencies (Meadowcraft 2004). As we have seen, the challenges of popular participation, environmental knowledge building, and institutional adequacy are even more acute at the international level than they are within states. To see how deliberative democracy might help us confront these challenges, a more complete understanding of the concept is necessary.

Deliberative democracy is a concept that defies easy definition. The deliberative democracy movement has been spawned by a growing realization that contemporary liberalism has lost something of its democratic character. Modern democracies, confronted by cultural pluralism, social complexity, vast inequities of wealth and influence, and ideological biases that discourage fundamental change, have allowed their political institutions to degenerate into arenas for strategic gamesmanship in which there is little possibility for genuine deliberation (Bohman 1996, 18–24). True democracy is impossible where citizens are mere competitors with no commitments beyond their own narrow self-interests. How to move beyond mere interest is a matter of considerable debate. Elsewhere (Baber and Bartlett 2005) we have described three distinct approaches to deliberative democracy—public reason, ideal discourse, and full liberalism. Our ultimate objective in this book is to suggest how deliberative democracy might inform our thinking about the international “democracy deficit” in general and the challenge of developing an international environmental jurisprudence in particular.

Public reason is an approach to deliberative democracy advanced most prominently by John Rawls (1993, 1999a, 1999b, 2001). Rawls ventured beyond fundamental rights and goals of distributive justice by using only the Kantian pursuit of universalizable principles and the perspective of the least favored (I. Shapiro 2001). The intuition at work is that if persons would agree to a policy principle when they might be the ones most adversely affected by it, they should agree to it in every other circumstance as well (applying the transitivity principle of rationality). For Rawls, “public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution” (Rawls 1993, 214). Deliberation is a search for binding precommitments to political values that are fundamentally important but limited in scope (Bartlett

and Baber 2005). In this form of deliberation, one reasons from the little one knows in the “original position” (wherein all information about one’s personal situation is hidden by a veil of ignorance) in pursuit of unanimity based on reasons with which anyone similarly situated would freely agree. In this mode of deliberation, individual interests are neither compromised nor reconciled. They are eliminated as reasons that can justly be offered in defense of one’s positions (36–38).

The conception of individual citizens advanced by Rawls’s theory of public reason is the most difficult approach of the three we will deal with because it diverges the most dramatically from our everyday experience. Rawls’s well-ordered society is populated by people who are “equal . . . autonomous . . . reasonable” and possessed of the “capacity for social cooperation” (Rawls 1993, 306). Furthermore, they view society as “a fair system of cooperation over time, from one generation to the next” (15). Also, they aspire to be both rational in a technical sense and reasonable in a broader political sense. This is because “merely reasonable agents would have no ends of their own they would want to advance through fair cooperation; merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of others” (52). Because they share these characteristics, the citizens of a well-ordered society would readily commit themselves to abide by the principles of justice flowing from a discourse in which they (or their representatives) were guided by the regulative concept of the veil of ignorance. This concept requires decision makers to ignore virtually all information about their positions in society, their individual interests, and even which generation they represent (Rawls 1999c).

The approach taken by Rawls has both advantages and difficulties. Some critics of deliberative democracy have complained that deliberation of this sort has a sedative effect that curbs the behavior (and thus the influence) of the historically disadvantaged. They also argue that some citizens are better at articulating their arguments than others, so much so that well-educated white males are destined to prevail in the deliberative environment (Sanders 1997). The Rawlsian approach, however, sedates all participants with the same dosage of the same drug. Although Rawls acknowledges that we all have a right to products of our own abilities, they can justly provide us only what we become entitled to “by taking part in a fair social process” (Rawls 1993, 284). Presumably, fine debating skills, whether innate or acquired, are covered by that injunction.

Others have suggested that Rawls’s conception of public reason is too narrow because it is based upon the assumption that people’s preferences

are determined prior to political interaction and do not change as a result of such interaction (Offe 1997). But this is true only to the extent that Rawls's theory embodies an attempt to justify collective decisions by appealing to reasons that can be adopted by people simply by virtue of their common citizenship and the shared interests implied by that common status (Evans 1999). Indeed, the greatest problem with Rawls's approach to public reason may be that, rather than counting too little on change, it counts on change far more than is reasonable. Deliberative democracy of the kind he advocates requires a radical equality of access for individuals, groups, and interests that have been historically excluded from decision making (Rawls 1999a, 580–581). If actually achieved, such a circumstance would unsettle, if not subvert, existing understandings about the dimensions and boundaries of political conflict (Knight and Johnson 1994, 289).

A second form of deliberative democracy, ideal discourse, is most closely associated with the work of Jürgen Habermas. In this view, deliberative democracy relies on a shared political culture and is rooted less in government institutions than in civic society. For Habermas, deliberation is a process of testing the competing validity claims put forward by citizens in search of a general consensus based upon reasons that are shared, not merely public. In ideal discourse, individual interests are the source of these competing validity claims. But those interests are not regarded as givens, the fundamental stuff of politics. Interests must be open to change because citizens engaged in ideal discourse are committed to search for a genuine meeting of the minds, rather than the *modus vivendi* that less demanding approaches, such as full liberalism (discussed next), might allow (Baber and Bartlett 2005, 35–36).

The view of citizens in the ideal discourse situation adopted by Habermas shares much with that of Rawls, but differs in some important ways. Habermas speaks of personally autonomous participants in deliberative discourse who are “free and equal,” each of whom is “required to take the perspective of everyone else,” and who thus project themselves “into the understandings of self and the world of all others” (Habermas 1995, 117). They do not, however, adopt this attitude out of any commitment to abstract principles of justice produced in a reflective equilibrium free of ideology and interest. These citizens are committed to advancing their normative validity claims in forms that can be treated like truth claims; that is, in forms that can be subjected to empirical evaluation (Habermas 1990). There is no mechanism of impartiality at work. Indeed, Habermas (1995) criticizes Rawls for his willingness to purchase the neutrality

of his conception of justice at the cost of forsaking its cognitive validity claim. It is as if Habermas is invoking the second clause of Rawls's own maxim that "justice is the first virtue of social institutions just as truth is of systems of thought" (Rawls 1999c, 3).

The reasonableness Habermas seeks is born of a social and cultural commitment to an inclusive and rational discourse (Habermas 1995) based upon "the justified supposition of a 'legitimate order'" (Habermas 1996, 68). It is true that the processes of internalization that structure the normative foundations of the values espoused by citizens are not free of repressive and reactionary tendencies (Habermas 1996). It is also true that those who constitute the politically interested and informed class of the public may be disinclined to seriously submit their view to discussion (Habermas 1998d). Ultimately, however, the consciousness of their own autonomy gives rise to an "authority of conscience" that becomes an integral part of the politically informed and active citizen's motivational foundation (Habermas 1996, 67). This commitment to intellectual honesty would seem to be an essential element of the ideal discourse situation, conceived of as a rational and noncoercive discourse designed to test empirically the truth-value of competing normative claims.

Finally, full liberalism is a widely shared perspective exemplified most clearly by the ideas of James Bohman, Amy Gutmann, and Dennis Thompson. Their work can be viewed as an attempt to reconcile the divergent approaches of Rawls and Habermas in ways that make deliberative democracy more feasible in a complex and normatively fragmented society. Bohman describes a politics characterized by equality of both access and influence, good-faith bargaining, and plurality rule accompanied by continuing minority acceptance of the fairness of the process. Thus, in full liberalism one's individual interests are the primary source of individual preferences and motivation. But the reasons a citizen offers to others in support of his or her policy positions must transcend personal interests, at least to some extent. They must be public reasons, but only in the limited sense that their acceptability is not dependent on membership in some particular social group (Baber and Bartlett 2005, 34–35).

The theory of full liberalism is, in many ways, less demanding than either public reason or ideal discourse (Baber 2004). For example, Bohman assumes that citizens in a democracy are unavoidably divided by deep-seated normative differences he describes as cultural pluralism (Bohman 1994). He also doubts the possibility that any form of public reason or



any view of the common good can ever command a consensus in communities as complex as the modern democracies. In Bohman's view, "community biases" and the exclusion of many from "effective political participation" are unavoidable, at least to some extent (Bohman 1996, 238). Finally, Bohman argues that knowledge and information are always scarce resources in a complex society, and that neither innate capacities nor acquired knowledge can ever be evenly or widely distributed. Consequently, citizens in pluralistic democracies will inevitably "surrender their autonomy to experts, delegates, and other forms of the division of labor" (168).

This does not suggest that deliberative democrats should surrender to the injustices currently observable in democratic life. Bohman supports an equalization of deliberative resources and capacities as far as that is possible, as do other deliberative democrats (Cohen 1997; Gutmann and Thompson 1996). But as Dryzek has pointed out, some degree of inequality may not only be unavoidable, it also may actually serve as grist for the deliberative contest (Dryzek 2000, 172–173). The point of providing support to the disadvantaged in the context of public deliberation is not to equalize their position with "the other interest groups jostling for influence" but, rather, to ensure that they can make "effective use of their political liberties" (Gutmann and Thompson 1996, 305, 277). Strict equality is neither necessary nor desirable from the point of view of maintaining the critical edge brought to deliberation by the disadvantaged. After all, it is not as if deliberation under full liberalism is a search for one correct solution.

Having rejected the notion of a singular form of public reason, it is not surprising that theorists of full liberalism should find themselves in the company of the majority of representative democrats who, from Burke's time, have regarded political questions as inevitably controversial ones without a right answer (Pitkin 1967). The objects of deliberation, in their view, are the interests of specific persons who have a right to help define them. Politics is recognizably democratic when it gives them that right. These deliberative democrats do not try to specify a single form of citizenship. They search for "models of representation that support the give-and-take of serious and sustained moral argument within legislative bodies, between legislators and citizens, and among citizens themselves" (Gutmann and Thompson 1996, 131). In this way, deliberative democracy is not so much a search for ethically or empirically defensible solutions as it is a process of personal development for citizens. John Dryzek

has argued that, in the face of ideologies and structural forces that perpetuate distorted views of the political world, we should seek the competence of citizens themselves to recognize and oppose such forces, which “can be promoted through participation in authentically democratic politics” (Dryzek 2000, 21). Thus, one might say that the most important product of deliberative democracy is neither just principles nor rational policies but, rather, the critical capacities of the citizens themselves. It might further be argued that this objective is the most important one that collective-will formation can pursue. After all, to the extent that permanent solutions to the ecological crisis require significant changes of collective consciousness, preserving our species and its environment may be possible only through such a process of social evolution.

Full liberalism’s most important contribution to our concerns in this book arises from Bohman’s notion of a plural form of public reason and the advocacy, by Gutmann and Thompson, of give-and-take in representative institutions. Both of these ideas touch upon one of the most serious criticisms that has been leveled at theorists of deliberative democracy, namely, that both Habermas and Rawls have made a mistake by insisting that citizens converge on the same reasons for a decision rather than agreeing on a course of action each for his or her own reasons. This convergence, it has been suggested, can be no more than an ideal of democratic citizenship rather than an actual requirement of public reason (Bohman 1996). Worse yet, according to these critics, this preoccupation with convergence has led Habermas to the strong principle of unanimity that will ultimately render his theories impractical in a world characterized by social complexity and moral pluralism (Bohman 1994). In fact, Dryzek has concluded that Habermas “long ago realized the practical difficulties that precluded the realization of consensus in practice” (Dryzek 2000, 72). Habermas may, however, have actually done something rather more subtle.

In his recent work, Habermas (1996) maintains a strong emphasis on reasoned consensus while showing a willingness to discuss majority rule in certain circumstances. Some have concluded that he has abandoned his earlier commitment to unanimity in the face of moral complexity and now regards consensus as merely a “regulative ideal” (Gaus 1997). On this view, consensus is merely “a model for real world discourse in concrete, historical conditions” (Postema 1995, 359).

Habermas, however, describes a form of majority rule that suggests a certain practical priority for consensus (Habermas 1997b). Consensus

and majority rule are compatible, in his view, “only if the latter has an internal relation to the search for truth.” Public reason must “mediate between reason and will, between the opinion-formation of all and the majoritarian will-formation of the representatives” (Habermas 1997b). A decision arrived at in the political realm through majority rule is legitimate only if “its content is regarded as the rationally motivated but fallible result of an attempt to determine what is right through a discussion that has been brought to a *provisional* close under the pressure to decide” (47; emphasis in the original). Habermas is careful to indicate that such a decision does not require the minority to concede that it is in error or to give up its aims. It requires only that they forgo the implementation of their view until they better establish their reasons and gain the necessary support (47). Ideally, then, a vote is only “the concluding act of a continuous controversy” carried out publicly between argument and counterargument (Habermas 1998d, 212). If the idea of a concluding act seems to fit poorly with the concept of a continuous controversy, we can better understand why many have found Habermas to be elusive on this subject.

What are the practical implications of this view of majoritarianism? First, it should be apparent that accepting something less than consensus is justified only where the pressure to decide precludes further deliberation. In some circumstances, action must be taken if an opportunity is not to be lost. In other cases an institutional imperative may require that something be done in a circumstance where the perfect may have become the enemy of the good. Often the prospect of immediate and irreparable harm to the environment or to human interests justifies action in the face of what may be significant uncertainty about the facts. Other principles of immediacy are certainly conceivable. But the concepts of lost opportunity, institutional imperative, and imminent harm are clearly major categories of the pressure to decide.

A second implication of this view is that public reason must be the tool used to determine when the pressure to decide is sufficient to justify majority rule. In this way, the political process of majoritarian will formation is disciplined by the social process of the opinion formation of all. In effect, the minority maintains a veto on collective action but chooses not to exercise it immediately in the expectation that the discourse will continue and any intermediate action will be regarded as a provisional decision based upon only a weak consensus that prompt action is required. So majority rule will always be available, but it will be legitimate only

where members of the minority are satisfied that the discourse will continue and they will not ultimately be required to yield to the force of numbers.

Finally, where lost opportunities and immediate harms are major concerns, and where many (if not most) decisions will be regarded as legitimate only if they are provisional, there must be a strong bias against any action (or inaction) with irreversible consequences. Providing protection for an endangered species is a positive manifestation of this negative bias. The species can be de-listed, should further research warrant. But an old growth forest that is logged, or a wetland that is paved over, is a permanent loss that later regrets cannot recover. These are actions that a majority could not justify as provisional decisions. So, if our description of Habermas's theory is sound, neither he nor other deliberative democrats who accept his reasoning should ever tolerate such decisions absent a genuine consensus among all those choosing to debate the issues in the ideal discourse situation.

### **From Municipal to Cosmopolitan Environmental Law**

At this point in our discussion, are there any tentative conclusions that could guide us in conceptualizing an international environmental jurisprudence? In our view, three general remarks are in order. First, for environmental law to attain global reach humankind must invent a mechanism that allows for the formation of a collective will in the absence of sovereignty as it is conventionally understood. If environmentalism represents an intersection of science and reason, one would never expect it to exist solely within the narrow confines of government (Ehrlich and Ehrlich 1996). Why, then, would we assume that environmentalism can be held captive by so limited an institution as the sovereign state (Dryzek et al. 2003; Dryzek 2005; Dryzek and Schlosberg 2005)? Benvenisti and others have discussed the idea of formally empowering substate units of government to enter into international agreements (Benvenisti 2000). The potential of non-state-centric environmental governance has been explored by Wapner (1996) and others. How much further a step would it be to empower citizens to engage one another on the international stage in deliberation regarding the survival of the species? After all, "just as there are issues of scale inherent in any environmental issue, so citizenship is an issue of scale. Each begins, although neither ends, at a local level with local knowledge" (Curtin 1999, 179).

Second, this insight provides the foundation for our general observation that international environmental jurisprudence must be grounded in a knowledge base that is local and concrete. Environmentalism has long been understood to be dependent on the insights of scientific disciplines that advance universal propositions based upon empirical research. As we have argued, it could hardly be otherwise. But the political ecology upon which international environmental law must be founded must adopt a “critical attitude” toward supposedly neutral explanations of ecological reality (Forsyth 2003, 267). Environmental problems are not merely particular manifestations of general principles. They always arise in a human context, and dealing with them effectively requires a wisdom of place, an understanding of the role that the environment plays in the cultural experiences of resident populations (Basso and Felds 1996). International environmental agreements benefit from strong support in civil society from coalitions of interest and ideology that unite private and public actors (Zartman 2001). The positive relationship between international environmental agreements and civic environmentalism runs in the opposite direction as well. International agreements give rise to support groups throughout member nations (transnational coalitions, grass-roots organizations, and monitor and watch groups), which are crucial to building and sustaining the information base and political resources necessary for implementation of the agreements themselves (Deng and Zartman 2002).

Third, just as the knowledge base of international environmental law must be “democratized,” so must be the political processes that produce it. International environmental agreements are sustained as meaningful regulatory processes over time by constant give-and-take over changing conceptions of consensual knowledge (Sjöstedt 2003). The importance of consensus in this regard can be traced to the fact that international environmental agreements are largely self-enforcing by their very nature. There are often political costs for noncompliance that pose significant trade-offs for negotiation purposes. But there are rarely significant inducements to comply or sanctions for noncompliance (Barrett 1998). It is in this context that the debate among deliberative democrats over the place of consensus in popular government finds its natural home. Consensus in collective decision making at the national or subnational level may be a regulative norm or a mere aspiration. But when one steps on the international stage, consensus becomes a practical necessity.

So what we seek, then, is nothing less than collective choice without sovereignty, reliable knowledge without abstraction, and effective implementation without coercion. Reasons for rejecting this agenda abound. Only the necessities of human survival can be offered in its defense. But pessimism at the outset is unwarranted in light of the fact that popular government appears to be succeeding at the level of the nation-state. After all, effective environmental law at the international level only requires us to perform the same basic functions that domestic governments perform—the legislative, administrative, and adjudicatory functions (Sands and Peel 2005). We must remember that whether the international institutions and process that eventually develop to satisfy these functional requirements resemble their municipal counterparts is less important than that they be fully democratic and ecologically sustainable.

In later chapters, we offer a specific proposal for global collective will formation, such that general commitments to abstract principles of environmental protection can be developed into more concrete and specific obligations that would allow organizations and individuals to assert and answer claims in coherent ways. A deliberatively democratic approach suggests both a jurisdictional and a jurisprudential rationale for the resolution of environmental disputes by international tribunals, namely, by reference to a juristically democratic kind of transnational common law. Specifically, we imagine certain institutions—innumerable citizen-constituted policy juries that deliberate hypothetical cases, at least one global codifying agency, and a resulting cosmopolitan and transnational common law—that can provide for “scaling up” deliberative democracy to the global level, by offering processes that can integrate local knowledge and contextual ecological science in ongoing global democratic will formation. Imperatives of the current world order of states and global capitalism pose challenges, but success would not be contingent on these being abolished or ignored or wished away.

Our intent is to advance a proposal that is entirely realistic and pragmatic, in the hardest-headed senses of those words. But both of those words come with philosophical and ideological baggage that immediately entangles, potentially introducing a level of complexity and confusion into the understanding of terms that most ordinary people use in relatively unproblematic ways. Essential to our argument that follows is a functional analysis of the requirements of international law and of the necessity of freeing ourselves from the constraints imposed by assump-

tions about how those requirements should be met. Essential as well is an analysis of the merits of a foundation in philosophical pragmatism for both deliberative democratic theory and international relations theory and the necessity of freeing ourselves from the constraints imposed by assumptions about the pluralist and statist context of international politics. These are the tasks of the next three chapters, before we turn explicitly to an exploration of how we might cultivate a transnational common law.